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Nos. 84-1778 and 84-6972

In the Supreme Court of the United States

OCTOBER TERM, 1985

GUY THOMAS FISHER, PETITIONER

v.

UNITED STATES OF AMERICA

JAMES WHEELINGS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether prohibiting petitioners from questioning prospective jurors on voir dire about their names, addresses, and places of employment violated petitioners' due process rights.

2. Whether the co-conspirator exception to the hearsay rule applies when the conspiracy alleged is a conspiracy to violate the racketeering laws.

3. Whether the imposition of consecutive sentences for violation of the racketeering laws, conspiracy to violate the racketeering laws, and conspiracy to violate the narcotics laws violated the Double Jeopardy Clause.

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OPINION BELOW

The opinion of the court of appeals (84-1778 Pet. App. A1-A37) is reported at 757 F.2d 1359.

JURISDICTION

The judgment of the court of appeals was entered on March 11, 1985. Petitioner Wheelings' petition for rehearing was denied on April 25, 1985. Petitioner Fisher's petition–for a writ of certiorari (No. 84-1778) was filed on May 10, 1985. The petition for a writ of certiorari for petitioner Wheelings (No. 84-6972) was not filed until June 27, 1985, and is therefore out of time under Rule 20.1 of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioners were convicted of conspiracy to violate the narcotics laws, in violation of 21 U.S.C. 846 (Count 1), participating in the affairs of an enterprise through a pattern of racketeering, in violation of 18 U.S.C. 1962(c) (Count 14), and conspiracy to commit that offense, in violation of 18 U.S.C. 1962(d) (Count 13).[1] In addition, petitioner Fisher was convicted of operating a continuing criminal enterprise, in violation of 21 U.S.C. 848 (Count 2), and possession of heroin with intent to distribute, in violation of 21 U.S.C. 841(a)(1) (Count 7).[2]

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[1] Petitioners were acquitted of conspiracy to violate civil rights, in violation of 18 U.S.C. 241 (Count 15).

[2] Petitioner Fisher was sentenced to life imprisonment without possibility of parole and a $100,000 fine on Count 2; 15 years' imprisonment and $25,000 fine on Count 7; and 20 years' imprisonment and a $12,500 fine on each of Counts 13 and 14. All of petitioner Fisher's sentences are consecutive, with the exception of the 15-year term of imprisonment

1. a. The evidence at trial, which is not in dispute, showed that from 1972 to 1983 petitioners and several other individuals were associates in a massive narcotics enterprise run by a governing body called the "council." Each council member had a separate narcotics business, employing subordinates to distribute heroin in his respective territory in New York. Council members also purchased and distributed large quantities of cocaine, marijuana, and phencylidine (PCP). The council operated by pooling the resources of its members, sharing narcotics sources, allocating sales territories, adjudicating disputes among members, and handling the narcotics business of jailed members. To ensure the success of the operation and to maintain internal discipline, council members routinely approved the murders of suspected potential witnesses or of individuals who had been insubordinate. See Pet. App. A5-A6.[3]

Petitioner Fisher functioned as an organizer and supervisor of one of the council's seven narcotics businesses. Moreover, he assumed a leading role in dealing with one of the council's principal sources of heroin, managed one of the council's car leasing businesses, and developed new sources for cocaine, PCP, and marijuana after the 1978 conviction and incarceration of fellow council member and partner Leroy

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on Count 7, which is concurrent with the sentence on Count 2. The sentence on Count 1 merged with the sentence on Count 2. Appellee's Br. 5 n.*.

Petitioner Wheelings was sentenced to 15 years' imprisonment and a $25,000 fine on Count 1; 15 years' imprisonment and $12,500 fine on Count 13; and 20 years' imprisonment and $12,500 fine on Count 14. All of these sentences are consecutive. Appellee's Br. 7 n.*.

[3] "Pet. App." refers to the appendix to the petition in No. 84-1778.

"Nicky" Barnes. Petitioner Wheelings worked as a member of Fisher's heroin processing crew, later assuming a leading role in Fisher's organization. Ultimately, petitioner Wheelings formed his own heroin business. See Pet. App. A6.

b. Prior to trial, the government moved for an order limiting voir dire examination of the jury panel so as to prevent disclosure of jurors' names, addresses, or places of employment. In support of its motion, the government submitted an affidavit by the Assistant United States Attorney handling the case that stated that such procedures were necessary in order to protect the jurors from retaliation or the fear of retaliation (Romano Aff. 2-7).[4] The affidavit pointed to the indictment itself, which contained charges that the defendants had murdered several individuals believed by them to be government witnesses (*id.* at 4-5). The affidavit further asserted that the government had reliable information that the defendants had agreed to pay $1 million for the murder of Leroy "Nicky" Barnes because they believed him to be a government witness and that contracts existed for the murder of Barnes and his two young daughters (*id.* at 5).

At the August 26, 1983 hearing on the government's motion, defense counsel made no attempt to rebut the government assertions, but simply objected to the proposed procedure on the grounds that it would deprive them of their ability meaningfully to exercise their peremptory challenges and would improperly relay a message to the jury that the defendants were dangerous (8/26/83 Tr. 17, 27-31,

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[4] "Romano Aff." refers to the August 17, 1983 affidavit of Benito Romano submitted in support of the government's motion for an anonymous jury.

33-39). Defense counsel further argued that such a restriction on voir dire was unnecessary because the government had made no claim that there had been any attempts in the instant case to tamper with the jury (*id.* at 21-22). The government reiterated the factual claims contained in its affidavit and additionally advised the court that it had information, which it would attempt to elicit at trial, that attempts had been made during petitioner Fisher's 1977 trial on narcotics charges to tamper with the jury (*id.* at 42). That case had ended in a mistrial with respect to Fisher (*United States* v. *Barnes*, 77 Cr. 190 (HFW)).[5]

Following the hearing, the government filed an additional affidavit by a different Assistant United States Attorney that provided further information in support of the claim that petitioner Fisher had tampered with the jury during his prior narcotics trial. The affidavit stated that both Barnes and another confidential informant had advised the government that petitioner had paid a juror in that case $25,000 in return for obtaining a hung jury and that petitioner during that case had attempted to kill three government witnesses (Douglas Aff. 1-3).[6] The affidavit further recited that because of the contract

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[5] Leroy "Nicky" Barnes had been convicted in the 1977 trial of conspiracy to violate the narcotics laws, substantive narcotics violations, and engaging in a continuing criminal enterprise. See *United States* v. *Barnes*, 604 F.2d 121 (2d Cir. 1979), cert. denied, 446 U.S. 907 (1980). Barnes subsequently began cooperating with the government.

[6] "Douglas Aff." refers to the September 1983 affidavit of Assistant United States Attorney Philip Douglas that was filed following the hearing on the government's motion for an anonymous jury.

on their lives, Barnes' two daughters had been placed in protective custody (*id.* at 4). The affidavit stated that after Barnes's cooperation became known, his girlfriend had been murdered "gangland" style in a Harlem bar and that during petitioner's initial presentment to the magistrate in the instant case, petitioner had made hand signals to his brother, who had been convicted in the 1977 case, indicating that a Drug Enforcement Administration (DEA) agent and a police officer, who had been witnesses to damaging post-arrest statements by petitioner, should be killed (*ibid.*). Petitioner's counsel filed an answering affidavit in which he complained of the hearsay nature of the allegations contained in the post-hearing affidavit, labelled the allegations "hogwash," and requested a hearing (Kunstler Aff. 1-3).[7]

The district court denied the request for an evidentiary hearing and decided that the jury should be anonymous and sequestered. During voir dire, the court instructed the prospective jurors not to reveal their names, addresses, or places of employment or to discuss those matters with anyone (10/11/83 Tr. 2-3). The court explained to the jurors (*id.* at 11-13) that it was keeping their identities anonymous in order to prevent media curiosity from interfering with their duty to consider only the evidence when deciding the case.

2. The court of appeals affirmed (Pet. App. A1-A37). Relying on *United States* v. *Barnes*, 604 F.2d 121 (2d Cir. 1979), cert. denied, 446 U.S. 907 (1980), in which the use of an anonymous jury had likewise

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[7] "Kunstler Aff." refers to the September 7, 1983 affidavit of defense attorney William Kunstler filed in response to the Douglas Affidavit.

been upheld, the court of appeals found (Pet. App. A7-A12) that use of an anonymous jury was a valid precautionary measure that was fully warranted under the circumstances of this case. The court further found that this procedure had not undermined the presumption of innocence because the explanation given the jury for adopting such a procedure had not cast the defendants in an unfavorable light.

ARGUMENT

1. Petitioners contend (84-1778 Pet. 13-22; 84-6972 Pet. 23) that trial by an anonymous jury violated their right to due process and to an impartial jury because it extinguished the presumption of innocence by suggesting to the jurors that the defendants were dangerous and might harm them. The procedure challenged by petitioners was used in petitioner Fisher's first trial, which resulted in the conviction of several codefendants. In affirming those convictions, the Second Circuit upheld this procedure (604 F.2d at 133-143), and this Court denied a petition for certiorari that challenged that holding (79-261 Pet. 9-22). See also *Press-Enterprise Co.* v. *Superior Court*, No. 82-556 (Jan. 18, 1984), slip op. 1 n.1 (Blackmun, J., concurring) (citing *Barnes* as an example of how courts have exercised their discretion to limit voir dire in order to protect juror safety). The decisions of the Second Circuit upholding this procedure do not conflict with any decision of this Court or any other court of appeals, and there is no greater reason for this Court to review the issue in this case than there was at the time of the petition in *Barnes*. In any event, the decision of the court of appeals was correct.

The manner in which the voir dire examination of a jury is conducted is left to the broad discretion of the trial judge. *Rosales-Lopez* v. *United States*, 451 U.S. 182, 189 (1981) (plurality opinion); *United States* v. *Lambinus*, 747 F.2d 592, 598 (10th Cir. 1984); *United States* v. *Bosby*, 675 F.2d 1174, 1184 (11th Cir. 1982). A defendant has no inherent right to have any questions he wishes put to the jury. *United States* v. *Verkuilen*, 690 F.2d 648, 660 (7th Cir. 1982); *United States* v. *Barnes*, 604 F.2d at 140. Rather, a defendant has the right only to have questions asked that will expose the existence of reasons to challenge for cause and that will elicit sufficient information to allow the intelligent exercise of peremptory challenges. *United States* v. *Jones*, 722 F.2d 528, 529 (9th Cir. 1983); *United States* v. *Tegzes*, 715 F.2d 505, 507 (11th Cir. 1983); *United States* v. *Bosby*, 675 F.2d at 1182; *United States* v. *Taylor*, 562 F.2d 1345, 1355 (2d Cir.), certs. denied, 432 U.S. 909 and 434 U.S. 853 (1977). Here, apart from the restrictions concerning name, address, and place of employment, the voir dire examination was far-reaching and fully explored all matters that might show any bias or prejudice on the jurors' part.

Indeed, petitioners make no claim in this Court that their inability to learn the jurors' names, addresses, and places of employment in any way hampered their ability to make intelligent decisions regarding peremptory challenges or challenges for cause. Rather, petitioners' sole challenge to the procedure adopted is that it conveyed the idea to the jury that the defendants were dangerous, thus extinguishing the presumption of innocence and denying them a fair trial. Petitioners are wrong.

To be sure, a court must be sensitive to trial procedures that may adversely affect the jurors' judgment of the defendant and undermine the fairness of the factfinding process. Thus, in *Estelle* v. *Williams*, 425 U.S. 501 (1976) (see 84-1778 Pet. 14-15), this Court recognized that an accused cannot be compelled to attend trial in prison clothing. Such a constant reminder of the defendant's condition, the Court held, might well affect a juror's judgment and thus undermine the presumption of innocence. The Court has also recognized, however, that certain trial procedures are sometimes necessary despite possible adverse effects on the jury's feelings about the defendant. Thus, in *Illinois* v. *Allen*, 397 U.S. 337, 344 (1970), the Court noted that under extreme circumstances a contumacious defendant may be compelled to stand trial while gagged and shackled. Whether a particular practice impermissibly infringes on the defendant's right to a fair trial must be determined by weighing the possible prejudice to the defendant against the need for employing the procedure.

Here, there was ample reason to curtail voir dire examination to prevent disclosure of the jurors' names, addresses, and places of employment. First, the indictment charged the defendants with the murders of several individuals believed by the defendants to be government witnesses. Moreover, reliable information revealed that a murder contract had been taken out on the government's principal witness and his two young daughters; that petitioner Fisher had threatened law enforcement personnel at his initial appearance before the magistrate; and that petitioner Fisher at his 1977 trial on narcotics charges had bribed one of the jurors. In these circumstances, the trial court would have been remiss in not acting

to insure the safety of the jurors and to protect the integrity of the trial proceedings. In similar circumstances, where there is a legitimate concern for the safety of trial witnesses, the courts routinely have upheld orders providing for anonymity of those witnesses. See *United States* v. *Varella*, 692 F.2d 1352, 1355 (11th Cir. 1982), cert. denied, 463 U.S. 1210 (1983) (upholding government's objections to disclosure of names, addresses and occupations of two government witnesses); *United States* v. *Contreras*, 602 F.2d 1237, 1239 (5th Cir.), cert. denied, 444 U.S. 971 (1979) (prior and present addresses of DEA agent withheld); *United States* v. *Watson*, 599 F.2d 1149, 1157 (occupation of participant in Witness Protection Program concealed), modified on other grounds, 690 F.2d 15 (2d Cir. 1979); *United States* v. *Cavallaro*, 553 F.2d 300, 304 (2d Cir. 1977) (address of witness concealed); *United States* v. *Persico*, 425 F.2d 1375, 1383 (2d Cir.), cert. denied, 400 U.S. 869 (1970).

Petitioner Fisher nonetheless contends (84-1778 Pet. 18-22) that because sequestration of the jury was sufficient to protect the jurors during the trial, "[t]he only conceivable function of an anonymous jury [was] to shelter jurors from post-verdict revenge or retaliation administered by defendants unhappy with the outcome of the trial." There is simply no danger of such post-trial retaliatory attacks on jurors, argues petitioner, because "[e]ven the most amoral of criminals understands that attacking a juror after conviction will not benefit him." Petitioner's argument is doubly flawed. First, even though sequestration of the jury went a long way towards placing the jury members beyond attempts at bribery or retaliation during the trial, it could do nothing to prevent

threats or retaliation directed at members of the jurors' families. Second, as the court below aptly noted (Pet. App. A11 (citation omitted), "[a]s a practical matter, we cannot expect jurors to 'take their chances' on what might happen to them as a result of a guilty verdict." In short, the district court was under no obligation to risk the jurors' safety on the dubious assumption that defendants who were willing to murder a government witness and his two young daughters would draw the line at harming jurors.

When balanced against this need to protect the safety of the jurors, it is clear that the procedure adopted did not infringe petitioners' right to a fair trial or undermine the presumption of innocence. As the court below properly found (Pet. App. A11), the trial court gave the jury an "intelligent, reasonable and believable explanation for his actions that did not cast defendants in an unfavorable light." [8] Petitioner

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[8] The District Court instructed the prospective jurors as follows (10/11/83 Tr. 11-13):

> Now, this should be a very interesting case. Undoubtedly, it could receive considerable publicity, newspaper, radio and television. The media and the public may be curious concerning the identity of the participants, the witnesses, the lawyers and the jurors. That curiosity and its resultant comments might come to the attention of the jury selected here and possibly impair its impartiality by viewpoints expressed, comments made, opinions, inquiries and so forth.
>
> Now, such outside influences could tend to distort what goes on in court, the evidence, and be distracting and divert the attention of the jury, and it might result in people prying into personal affairs of the participants, including those selected as jurors, who are selected only to judge the evidence in the case that can legally come

Fisher nonetheless argues (84-1778 Pet. 16-17) that the trial court's instructions were insufficient to dispel the inference that the reason for anonymity was the dangerousness of the defendants. In particular, petitioner argues (*id.* at 17) that because the jury was to be sequestered, they did not have to be "unusually perspicacious" to realize that anonymity was not needed to prevent media interference. As an initial matter, petitioner's claim that the jurors would disbelieve the explanation given them for jury anonymity is sheer speculation. The explanation was highly plausible, and petitioner advances no support for his claim that the jury disbelieved it. Moreover, petitioner's argument ignores the fact that the trial

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before you, and thus to distort and distract attention from the case.

Consequently, taking into consideration all the circumstances, I have decided that in selecting those who will serve as the jury your name, your address and your place of employment will remain anonymous during the trial of this case, and that's the reason why you have been given numbers.

This will serve to ward off curiosity and seekers for information that might otherwise infringe on your privacy and it will aid in insulating and sheltering you from unwanted and undesirable publicity and embarrassment and notoriety and any access to you which would interfere with preserving your sworn duty to fairly, impartially and independently serve as jurors. It will permit the media complete freedom of coverage of this trial.

For similar reasons, the jurors ultimately selected will be sequestered and kept free from outside influence and apart from the trial of the case. They will be housed and fed at government expense in a desirable hotel facility, to be kept together, and have your meals and recreation facilities all at government expense, and to be transported to and from court each day by the marshals assigned for the purpose.

court's explanation concerning anonymity was directed towards the entire jury panel prior to voir dire, several days before sequestration of the panel that was ultimately selected. The trial court's explanation was thus directed towards contact with the media not only following jury sequestration, but prior thereto as well.

In short, the trial court handled the situation with which it was confronted in an entirely responsible manner and in a way that fully protected petitioners against any adverse inferences by the jury. Any belief on the jury's part that petitioners and their co-defendants were dangerous came not from the judge's explanation as to the need for anonymity, but rather from the evidence presented at trial connecting them with numerous brutal murders.[9]

2. Petitioner Wheelings contends (84-6972 Pet. 20-22) that the co-conspirator exception to the hearsay rule (Fed. R. Evid. 801(d)(2)(E)) should not ap-

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[9] Petitioner Wheelings argues (84-6972 Pet. 23) that because all of the government's allegations in support of an anonymous jury pertained only to petitioner Fisher, the names of the jurors should at least have been provided to Wheelings' attorney with orders not to disclose that information to his client. There are at least two major defects in Wheelings' argument. First, it is unresponsive to, if not inconsistent with, petitioners' claim that nondisclosure of the jurors' names was harmful to them because it undermined the presumption of innocence. Had disclosure been made only to Wheelings' attorney, it is much more likely that the jurors would have realized that their names were being withheld because of the danger of intimidation or retaliation at the behest of the defendants, rather than to avoid media attention, as the trial judge told them. Second, we submit that the trial court acted prudently in not jeopardizing the jurors by making the partial disclosure to which petitioner Wheelings claims entitlement.

ply to racketeering conspiracies. According to petitioner Wheelings, application of the co-conspirator exception is fundamentally unfair in a RICO conspiracy because such a charge is far broader than a traditional conspiracy and can involve highly diverse crimes by apparently unrelated individuals. This argument is meritless.

The co-conspirator exception to the hearsay rule (Fed. R. Evid. 801(d)(2)(E)) applies by its terms to all conspiracies, regardless of their objects, size, or scope. Petitioner has not pointed to any evidence that Congress had a contrary intention when it adopted this rule or the RICO statute [10] or to any authority construing the co-conspirator rule in the way he advocates. Indeed, the courts routinely have acknowledged the admissibility of co-conspirator statements in RICO prosecutions. See, *e.g.*, *United States* v. *Ruggiero*, 726 F.2d 913 (2d Cir. 1984); *United States* v. *Riccobene*, 709 F.2d 214, 226 (3d Cir.), cert. denied, 464 U.S. 849 (1983); *United States* v. *Lemm*, 680 F.2d 1193, 1204 (8th Cir. 1982), cert. denied, 459 U.S. 1110 (1983); *United States* v. *Calabrese*, 645 F.2d 1379, 1386 (10th Cir.), cert. denied, 451 U.S. 1018 (1981). Moreover, the Eleventh Circuit has squarely rejected the claim that the co-conspirator exception to the hearsay rule does not in-

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[10] As the court stated in *United States* v. *Carter*, 721 F.2d 1514, 1529 (11th Cir. 1984), cert. denied, No. 83-1743 (Oct. 1, 1984): "The content of the agreement criminalized by RICO is still defined against the backdrop of general conspiracy law." See also *United States* v. *Sutherland*, 656 F.2d 1181, 1192 n.7 (5th Cir. 1981) ("Congress * * * in RICO [did not seek] to change traditional conspiracy concepts, [but rather] * * * sought to expand the reach of traditional conspiracy charges by establishing a new substantive crime around which a conspiracy might center.").

clude statements of RICO conspirators made in the course of and in furtherance of a RICO conspiracy. *United States* v. *Hewes*, 729 F.2d 1302, 1313 (1984).

Petitioner Wheelings' specific complaint (84-6972 Pet. 22) is that co-conspirator statements concerning the murder of informants should not have been admitted against him because his role in the conspiracy was limited to participation in the narcotics business. This argument, however, provides no basis for distinguishing a RICO conspiracy from any other multiple-object conspiracy. In every multiple-object conspiracy, the various conspirators could argue that the government should not be permitted to introduce statements made in furtherance of criminal objectives in which they were not personally and directly involved. Since this limitation has not been imposed with respect to other multiple-object conspiracies, there is no reason to apply it to RICO conspiracies. By joining a conspiracy, a conspirator aids and may derive benefit from all of the conspiracy's activities, not just those in which he is directly involved. Thus, it is entirely appropriate to admit against him statements made in furtherance of any of conspiracy's objectives. Any danger that statements regarding inflammatory aspects of the conspiracy may unduly prejudice a defendant not personally involved in those activities can be addressed under Fed. R. Evid. 403.

3. Petitioner Wheelings also claims (84-6972 Pet. 13-19) that the imposition of consecutive sentences for his drug conspiracy, RICO conspiracy, and substantive RICO convictions violated the Double Jeopardy Clause.

a. Petitioner Wheelings first argues (84-6972 Pet. 13-17) that he impermissibly received consecutive

sentences for his drug conspiracy and RICO conspiracy convictions because those two offenses constitute the "same" offense for double jeopardy purposes. Specifically, petitioner claims that the drug conspiracy charge (Count 1) did not require proof of any fact that was not also required to sustain the RICO conspiracy charge (Count 13). The court of appeals properly rejected this argument (Pet. App. A22-A27), which does not in any event warrant further review by this Court. Petitioner cites no holding of any other court of appeals that conflicts with the decision below on this point; we have found only one other case in which a court of appeals has even addressed the issue, and it reached the same result as the Second Circuit. *United States* v. *Love*, No. 83-5171 (4th Cir. July 3, 1985), slip op. 25-26.

This Court has made clear that the propriety of cumulative punishments under the Double Jeopardy Clause is strictly a matter of legislative intent. See *Ohio* v. *Johnson*, No. 83-904 (June 11, 1984), slip op. 6 & n.8; *Garrett* v. *United States*, No. 83-1842 (June 3, 1985), slip op. 19; *Missouri* v. *Hunter*, 459 U.S. 359 (1983); *Albernaz* v. *United States*, 450 U.S. 333, 343-344 (1981); *Whalen* v. *United States*, 445 U.S. 684, 691-693 (1980). "With respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended." *Missouri* v. *Hunter*, 459 U.S. at 366. Thus, " 'the question of what punishments are constitutionally permissible is not different from the question of what punishments the Legislative Branch intended to be imposed. Where Congress intended * * * to impose multiple punishments, imposition of such sentences does not

violate the Constitution.'" *Id.* at 368 (emphasis omitted), quoting *Albernaz*, 450 U.S. at 344.

In applying this standard, the Court "has consistently relied on the test of statutory construction stated in *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932), to determine whether Congress intended the same conduct to be punishable under two criminal provisions." *Ball* v. *United States*, No. 84-5004 (Mar. 26, 1985), slip op. 5. Under *Blockburger*, "[t]he appropriate inquiry * * * is 'whether each provision requires proof of a fact which the other does not.'" *Ball*, slip op. 5 (citation omitted). Here, this test is met. A racketeering conspiracy proscribed by 18 U.S.C. 1962(d) requires proof of the existence or proposed creation of an "enterprise" the affairs of which are to be conducted by a "pattern of racketeering," while a drug conspiracy proscribed by 21 U.S.C. 846 does not. Section 846 requires proof of a narcotics-related conspiracy, while a RICO conspiracy does not.

Relying on Judge Newman's dissent (Pet. App. A27-A-37), petitioner Wheelings nonetheless argues that in determining whether offenses are the same under *Blockburger*, it is necessary to look to the indictment as drafted and the proof presented at trial. Under that approach, petitioner argues, the drug conspiracy was actually a lesser-included offense of the RICO conspiracy, because the RICO conspiracy count charged a conspiracy that had as its object making money by the illegal trafficking in narcotics and because many of the racketeering acts charged in the RICO conspiracy count were also alleged as overt acts in the drug conspiracy count. This argument, however, ignores the fact that the *Blockburger* test turns on the statutory elements of the offense and not on the allegations of the indictment or the government's

proof at trial. See *Albernaz*, 450 U.S. at 337-338; *Iannelli* v. *United States*, 420 U.S. 770, 785 n.17 (1975); *United States* v. *Solano*, 605 F.2d 1141, 1145 (9th Cir. 1979), cert. denied, 444 U.S. 1020 (1980).

Moreover, even if petitioner's understanding of the *Blockburger* test were correct, his characterization of the indictment in this case is not, for the Section 846 conspiracy charged here clearly requires proof of an element not required for conviction under the RICO conspiracy count in the indictment. The Section 846 conspiracy required proof that the defendants entered into an agreement to distribute drugs and to possess drugs with the intent to distribute them. The RICO conspiracy did not require proof of such an agreement but of an agreement to participate in the affairs of the enterprise through a pattern of racketeering activity, and the contemplated predicate acts alleged to constitute this pattern of racketeering activity included not only violations of the drug laws but other crimes, including murder. For example, petitioner Wheelings was alleged to have agreed to participate in the murder of Ronald Bell, Robert Geronimo, and Leroy "Nicky" Barnes (84-6972 Pet. App. 53a, 55a-56a, 62a). Thus, petitioner Wheelings' conviction for RICO conspiracy did not require proof that he agreed that the enterprise would engage in drug violations.

Finally, even if the Section 846 conspiracy in this case were a lesser included offense of the RICO conspiracy, it would still be necessary to determine whether Congress intended those offenses to be separately punishable. See *Missouri* v. *Hunter*, 459 U.S. at 368-369. For the reasons set out in the court of appeals' opinion (Pet. App. A25-A27), we believe that separate punishment was intended.

b. Petitioner Wheelings' argument (84-6972 Pet. 17-19) that he was improperly given consecutive sentences for his RICO substantive and RICO conspiracy convictions is equally meritless. This Court [11] and the courts of appeals [12] have consistently recognized that a substantive offense and a conspiracy to commit that offense are generally different offenses that satisfy the *Blockburger* test.

Petitioner's argument appears to rest solely on Wharton's Rule, which states that "an agreement between two people to commit a particular crime cannot be prosecuted as a conspiracy where the crime necessarily requires the participation of two persons

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[11] See, *e.g.*, *Jeffers* v. *United States*, 432 U.S. 137, 156-157 (1977) (plurality opinion); *Iannelli*, 420 U.S. at 777-779, 785-786 n.17; *United States* v. *Feola*, 420 U.S. 671, 693-694 (1975); *Callanan* v. *United States*, 364 U.S. 587, 593-594 (1961); *Pereira* v. *United States*, 347 U.S. 1, 11-12 (1954); *Pinkerton* v. *United States*, 328 U.S. 640, 643-644 (1946); *Carter* v. *McClaughry*, 183 U.S. 365 (1902).

[12] See, *e.g.*, *United States* v. *Marrone*, 746 F.2d 957 (3d Cir. 1984); *United States* v. *Nichols*, 741 F.2d 767, 772-773 (5th Cir. 1984), cert. denied, No. 84-985 (Feb. 19, 1985); *United States* v. *Bagaric*, 706 F.2d 42, 63 n.18 (2d Cir.), cert. denied, 464 U.S. 840 (1983); *United States* v. *DeVincent*, 632 F.2d 155, 159-160 (1st Cir. 1980), cert. denied, 450 U.S. 984 (1981); *United States* v. *Bright*, 630 F.2d 804, 813 (5th Cir. 1980); *United States* v. *Bosch*, 584 F.2d 1113, 1119 (1st Cir. 1978); *United States* v. *Shelton*, 573 F.2d 917, 918-920 (6th Cir.), cert. denied, 439 U.S. 827 (1978); *United States* v. *Inmon*, 568 F.2d 326, 329-333 (3d Cir. 1977); *United States* v. *Kearney*, 560 F.2d 1358, 1365-1367 (9th Cir.), cert. denied, 434 U.S. 971 (1977); *United States* v. *Ricco*, 549 F.2d 264, 272-273 (2d Cir.), cert. denied, 431 U.S. 905 (1977); *United States* v. *Armedo-Sarmiento*, 545 F.2d 785, 791-792 (2d Cir. 1976), cert. denied, 430 U.S. 917 (1977).

for its commission." *United States* v. *Rone*, 598 F.2d 564, 569 (9th Cir. 1979), cert. denied, 445 U.S. 946 (1980). However, the courts have generally recognized that Wharton's Rule has no application to the RICO statute. See *United States* v. *Cagnina*, 697 F.2d 915, 923 (11th Cir.), cert. denied, 464 U.S. 856 (1983); *United States* v. *Rone*, 598 F.2d at 569-571; *United States* v. *Ohlson*, 552 F.2d 1347, 1348-1349 (9th Cir. 1977); *United States* v. *Hawkins*, 516 F. Supp. 1204, 1206-1208 (M.D. Ga. 1981), aff'd, 671 F.2d 1383 (11th Cir. 1982) (Table), cert. denied, 459 U.S. 943 (1982); *United States* v. *Boffa*, 513 F. Supp. 444, 478 (D. Del. 1980).

First, the plain language of 18 U.S.C. 1962(c), the substantive RICO provision, clearly indicates that a violation may be committed by an individual acting alone. The statute makes it unlawful for "any person" to conduct an enterprise affecting interstate commerce through a "pattern of racketeering activity." The definitions of "pattern of racketeering activity" (18 U.S.C. 1961(5)) and "racketeering activity" (18 U.S.C. 1961(1)) do not incorporate any element of agreement or concerted activity. See *United States* v. *Ohlson*, 552 F.2d at 1349. Even if two or more persons together constitute an associational enterprise, the proscribed activity is not the enterprise but the pattern of racketeering activity in its furtherance. Such criminal conduct can be the act of a single person. As the Ninth Circuit has observed, "the enterprise is simply one of the jurisdictional elements of the statute." *United States* v. *Rone*, 598 F.2d at 570. See also *Iannelli* v. *United States*, 420 U.S. at 789 (the requirement of participation of "five or more persons" as an element of the substantive offense under 18 U.S.C. 1955 is jurisdic-

tional and does not "represent[ ] a legislative attempt to merge the conspiracy and the substantive offense into a single crime").

Moreover, the offenses proscribed by the RICO statute are significantly different from those, such as adultery, incest, bigamy, and dueling, to which Wharton's Rule has traditionally been applied. See *Iannelli* v. *United States*, 420 U.S. at 784. In contrast to those offenses, the harm attendant upon the commission of the substantive RICO offense is not restricted to the offender; the parties prosecuted for the conspiracy need not be the same persons who are prosecuted for commission of the substantive offense; and agreements to enter into large-scale racketeering activities are likely to generate additional agreements to engage in other criminal endeavors. These significant differences between the kinds of offenses that gave rise to Wharton's Rule and the activities proscribed by RICO "counsel against attributing significant weight to the presumption the Rule erects" (420 U.S. at 786).

Finally, even if Wharton's Rule were otherwise applicable, it would be necessary to determine whether Congress intended to create an offense of racketeering separate and apart from conspiracy. The very inclusion in the RICO statute of a separate conspiracy provision is persuasive evidence that Congress so intended. Moreover, as argued above, Congress' goal in enacting RICO was to provide enhanced sanctions to deal with the unlawful activities of those engaged in organized crime. See also *United States* v. *Martino*, 681 F.2d 952, 956-957 (5th Cir. 1982) (en banc).

Petitioner nonetheless argues (84-6972 Pet. 19) that the decision below, which comports with deci-

sions of the Third (*United States* v. *Marrone*, 746 F.2d 957 (1984)), Ninth (*United States* v. *Rone*, *supra*) and Eleventh (*United States* v. *Cagnina*, *supra*) Circuits, conflicts with the en banc decision of the Sixth Circuit in *United States* v. *Sutton*, 642 F.2d 1001, 1040 (1980), cert. denied, 453 U.S. 912 (1981). In *Sutton* the Sixth Circuit made the offhand statement that "the proofs * * * showing these defendants violated § 1962(c) and § 1962(d) were identical," and the court remanded for resentencing where the sentences originally imposed were consecutive (642 F.2d at 1040). However, the propriety of the consecutive sentences in *Sutton* was not even addressed in the briefs before the panel or the en banc court, and the disposition of the sentencing question appears to have been strictly limited to that case. Apart from the paragraph in *Sutton* on which petitioner relies, the Sixth Circuit has provided no further indication that it has abandoned the well settled principle that a conspiracy and its underlying substantive offense are separate crimes properly subject to consecutive punishment. See, *e.g.*, *United States* v. *Licavoli*, 725 F.2d 1040, 1049-1050 (6th Cir. 1984) ("Even if the predicate act of bribery and the RICO charge fail the *Blockburger* test * * * Congress did specifically authorize cumulative sentences under RICO."), cert. denied, No. 83-1657 (June 18, 1984); *United States* v. *Nickerson*, 606 F.2d 156, 159 (6th Cir.), cert. denied, 444 U.S. 994 (1979). Thus, in the future, following full briefing on the issue, the Sixth Circuit may well sustain the validity of consecutive sentences imposed for a RICO conspiracy and a substantive RICO violation. Until that circuit clearly demonstrates that it regards such consecutive sentences for RICO violations to be per se

improper, any alleged conflict between *Sutton* and the decisions of the other courts that uniformly have rejected the *Sutton* approach does not warrant review by this Court.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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